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InterDent Service Corporation

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an  
Idaho professional corporation,

Plaintiff,

V.

INTERDENT SERVICE CORPORATION, a  
Washington corporation,

Defendant.

INTERDENT SERVICE CORPORATION, a  
Washington corporation,

Third-Party Plaintiff,

 $V_1$ 

POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation; DWIGHT G. ROMRIELL, individually; LARRY R.

Case No. CV-03-450-E-LMB

**DEFENDANT/THIRD-PARTY  
PLAINTIFF'S MEMORANDUM IN  
SUPPORT OF MOTION AND  
APPLICATION FOR A TEMPORARY  
RESTRAINING ORDER**

DEFENDANT/THIRD-PARTY PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION  
AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER - 1

MISNER, JR., individually; PORTER SUTTON, individually; ERNEST SUTTON, individually; GREGORY ROMRIELL, individually; ERROL ORMOND, individually; and ARNOLD GOODLIFFE, individually,

Third-Party Defendants.

## I. INTRODUCTION

Not content to allow these proceedings to take their course, plaintiff Pocatello Dental Group ("PDG") and third-party defendant Dwight Romriell ("Romriell") have again resorted to self-help—this time by tampering with and diverting the United States Mail. PDG and Romriell have submitted papers to the Postal Service instructing the Post Office not to deliver mail to the Pocatello office located at 4155 Yellowstone Avenue (or Highway), Pocatello, Idaho 83202 ("the Pocatello Office") where defendant InterDent Service Corporation ("ISC") has processed the mail as provided under the Management Agreement between the parties' predecessors for the last seven years. By this motion, ISC seeks an order from the Court requiring PDG and Romriell to take all steps necessary to return matters to the status quo. Absent this relief, the Pocatello Office will probably have to close: PDG's creditors and vendors will go unpaid, ISC will go unpaid for the services it provides, and its employees will be out of work. PDG's patients could also be left out in the cold. Indeed, one PDG patient has already had his care delayed because x-rays sent in the mail did not arrive. There is little question that ISC will prevail on the merits and that irreparable injury exists. ISC's motion should be granted.

## II. FACTS

### A. The Management Agreement

In October 1996, ISC's predecessor paid PDG's shareholders \$2.8 million for the Group's nonprofessional assets and the right to provide management services to the PDG. ISC is

in the business of providing or arranging for management services, facilities, equipment, and certain personnel necessary for the operation of dental practices.<sup>1</sup> PDG consists of a limited number of shareholder-dentists and several "employee" dentists retained by the PDG.

Under the Dental Office Management Agreement (the "Management Agreement") between ISC's and PDG's predecessors, all business mail to PDG has been received and processed by ISC at the Pocatello Office. (Affidavit of Bruce Call "Call Aff.") ¶ 3). ISC processes the mail pursuant to Section 4.6 of the Management Agreement.

Article 4 of the Management Agreement gives defendant and third-party plaintiff InterDent Service Corporation ("ISC") day-to-day supervision of business activities, including "administrative services" such as "office space and facility management" and "billing" and "collections." (Call Aff., Ex. 1, §§ 4.1, 4.5(c) and (g).) In particular, ISC is responsible for the following:

4.6 Billing and Collection Payment of Expenses. In addition to the responsibilities of Manager under Section 2.6(b), Manager shall be responsible for all billing and collecting activities required by Group. Manager shall also be responsible for reviewing and paying accounts payable of Group. *Group hereby appoints the Manager its true and lawful attorney-in-fact to take the following actions for and on behalf of and in the name of Group:*

(a) Bill and collect in Group's name or the name of the individual practicing dentist, all charges and reimbursements for Group. Group shall give Managers all necessary access to Patient records to accomplish all billing and collection. In so doing, Manager will use its best efforts but does not guarantee any specific level of collections, and Manager will comply with Group's reasonable and lawful policies regarding courtesy discounts;

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<sup>1</sup> This background information is contained in the Affidavit of Ivar Chhina in Opposition to Plaintiff's Motion for Preliminary Injunction dated October 31, 2003, already on file in this action.

(b) Take possession of and endorse in the name of Group any and all instruments received as payment of accounts receivable;

(c) Deposit all such collections directly into Accounts and make withdrawals from such Accounts in accordance with this Agreement; and

(d) Place accounts for collection, settle and compromise claims, and institute legal action for the recovery of accounts.

(Emphasis added.) (Call Aff. ¶ 3, Exhibit 1, § 4.6).

For the past seven years, ISC and its predecessor have received the mail at the PDG address on Yellowstone Highway to fulfill ISC responsibilities under the Management Agreement. Should this business correspondence be diverted, PDG will not be able to pay its bills, and ISC will not, for example, be able to fulfill its responsibility to “take possession of and endorse in the name of Group any and all instruments received as payment of accounts receivable” and to “deposit all such collections into Accounts.” (*Id.* ¶ 4).

ISC’s responsibility for handling the mail and accounts payable and receivable is part of the broader division of responsibility between the parties. PDG is responsible for all aspects of the practice of dentistry and delivery of dental services, including the employment and termination of dentists at the Practice. (*E.g.*, Call Aff., Ex. 1 § 2.1). In return for their services, PDG’s shareholder dentists receive 38 or 39 percent of their net collections regardless of the amount of overhead or liabilities incurred by the practice.

ISC is responsible for the administration of the practice, including the provision of management services, facilities and equipment to PDG. Unlike the Group dentists who enjoy a fixed percentage of collections, however, ISC profits *only* if the remaining 61 or 62 percent of net collections exceeds the overheads and liabilities of the Practice. This is because ISC is

"responsible for paying *all claims and obligations* associated with the operation of Group," including salaries for nonprofessional staff, rent, equipment costs, and other overhead. (*Id.*, Ex. 1, § 2.6(b).) Of course, since its mail has been diverted and no revenues have been received while the scheme to divert the mail has been in effect, ISC has not received the funds necessary to perform these responsibilities.

**B. PDG's and Romriell's Diversion of the Mail**

At the direction, initially, of third-party defendant Dwight Romriell ("Romriell") the U.S. Postal Service has stopped delivering the mail to the Pocatello Office. (Affidavit of Scott J. Kaplan ("Kaplan Aff." ¶ 2, Ex. 2). Romriell was formerly employed at the Pocatello Office, but left on December 31, 2003. He has not been employed at Pocatello Office in 2004 nor is he this year to ISC's knowledge an officer or employee of PDG. (Call Aff., ¶ 2). Thus, he could not have been authorized to request this diversion of the mail.

On January 29, 2004, ISC's counsel faxed the Postmaster in Pocatello explaining ISC's rights under the Management Agreement and asking that the mail be released to ISC (Kaplan Aff. ¶ 2, Ex. 1). On January 30, the Postmaster called ISC's counsel and indicated that he was forwarding ISC's request to the U.S. Postal Service Legal Department. A lawyer from the Postal Service, Julie Hellerud, then requested additional information from ISC. This ISC provided (*Id.* ¶ 3, Ex. 3). On Wednesday, February 4, 2004, Ms. Hellerud communicated to ISC's counsel that James Price, counsel for PDG, had sent material in support of Romriell's scheme and that she probably would have to forward the documents to Postal Service Headquarters in Washington, D.C. (*Id.* ¶4).

On February 5, 2004, the Pocatello Postmaster called ISC's counsel to notify ISC that that Postal Service had decided to deliver to the mail to a post office box designated by the president of PDG, third-party defendant Gregory Romriell. The Postmaster would not provide

the number of the box. The Postmaster also stated that the Postal Service would comply with a court order directing that the mail be delivered to the Pocatello Office instead of to this secret post office box. He confirmed his conversation with counsel in writing. (Kaplan Aff. ¶ 5, Ex. 4.)

**C. The Consequences of The Diversion of The Mail**

Without receiving the funds forwarded by mail to the Pocatello Office, ISC will be unable to pay its creditors and PDG's creditors. If ISC is unable to pay its vendors, the Pocatello Office will suffer immediate and irreparable injury. Unpaid vendors obviously will be unwilling to provide the office with the supplies it needs to remain in business. Such third party vendors ISC will be unable to pay even include PDG and its dentists, because ISC will be unable to pay PDG for its dentists' salaries (the dentists are PDG, not ISC employees). Indeed, if PDG's scheme is allowed to continue and ISC does not receive the funds it needs to carry on the business, the Pocatello Office will probably have to close and then the PDG patients would be unable to receive care there. ISC would have to lay off the 89 employees in the office. It is highly questionable whether these patients or employees will ever return. (Call Aff. ¶ 5).

Moreover, if plaintiff and third-party defendants are able to divert the mail, they are also diverting funds that belong to ISC (approximately 62 percent of revenues). It is uncertain whether ISC will be able to locate these misappropriated funds. (*Id.* ¶ 6).

The diverted mail also includes patient healthcare information. *One patient has already been unable to receive care because x-rays mailed to the Pocatello Office did not arrive.* (*Id.* ¶ 7.) The lapses in patient care for PDG's patients will only increase the longer the mail is diverted. It is also ISC's understanding that under HIPAA, this information may not be diverted to third parties. ISC has received no written consents from patients allowing their information to be sent to other providers. (*Id.* 7).

It is not sufficient for the Court simply to order PDG to turn over mail collected in its secret post office box to ISC because this will entail delay and the potential, whether intentional, or not, for mail to be lost before it is turned over to ISC. Instead, it is necessary to carry on the business of the Pocatello Office, that PDG and the individual cross-defendants be ordered to do whatever is necessary for mail service to resume to the Pocatello Office. (*Id.* ¶ 9).

### III. ARGUMENT

A party seeking a temporary restraining order or preliminary injunction must meet one of two tests, the traditional test or the alternative test. *Stanley v. University of Southern California*, 13 F.3d 1313, 1319 (9th Cir. 1994). The first, or “traditional,” test requires the movant to establish (a) a fair chance of success on the merit, (b) a significant threat of irreparable injury if the injunctive relief is not granted, (c) at least a minimal tip of the balance of hardships the nonmovant will not be harmed more than the movant is helped by the injunction and (d) that the injunction will not harm the public interest. *Stanley*, 13 F.3d at 1319.

The second, or “alternative,” test allows a district court to issue a preliminary injunction if it finds either (1) a combination of probable success on the merits and the possibility of irreparable injury or (b) serious questions are raised and the balance of hardships tilts sharply in the movant’s favor. *Johnson v. California State Board of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

These two tests are not inconsistent; rather, the two tests represent “a continuation of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success must be shown.” *Regents of University of California v. ABA, Inc.*, 747 F.2d 511, 515 (9th Cir. 1984); *see also Westlands Water District . Natural Resources Defense Council*, 43 F.3d 457 (9th Cir. 1994). Therefore, if the balance of harms strongly favors the movant, it need not make a robust showing on the likelihood of success on the merits; instead, it

need only show that it has a "fair chance" of success. *Briggs v. Sullivan*, 886 F.2d 1132, 1143 (9th Cir. 1989).

Here ISC satisfies both the traditional and the alternative test.

**A. Relief Should Be Granted Under the Traditional Test**

**1. Because Defendant Is in Clear Breach of the Management Agreement, There Is a Substantial Likelihood ISC Will Succeed on the Merits**

Only a reasonable probability of success, not an overwhelming likelihood, is all that need to be shown by ISC. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991). Here, however, there is little question a substantial likelihood that ISC will prevail on the merits of its claim. All ISC is asking is that the plain language of the Management Agreement be enforced in the manner in which the parties performed for the first seven years of its existence. *See Electrical Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 822, 41 P.2d 242 (2002) (unambiguous contractual terms enforced as a matter of law); *Fox v. Mountain West Electric, Inc.*, 137 Idaho 703, 52 P.3d 848 (2002) (course of dealing evidence of proper construction of agreement).

Moreover, although PDG has apparently attempted to ratify Romriell's activities retrospectively, since he was neither a PDG officer nor employee when he initially diverted the mail, this diversion was potentially criminal in nature. It is not clear whether criminal misconduct can be retroactively ratified.

**2. ISC, its Employees and PDG's Patients Will Suffer Irreparable Harm Absent A Temporary Restraining Order**

Where, as in the case here, there is a strong probability of success on the merits, the moving party satisfies the "irreparable injury" requirement by demonstrating only that it will suffer a degree of hardship that outweighs the hardship facing the opposing party. *See Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993). Here, the irreparable



injury to ISC, its employees and PDG's patients are described above. If the misconduct continues, ISC will probably have to close the office. Patient care has already been compromised. (Call Aff. ¶ 7).

**3. A Balancing of the Hardships Favors Granting Relief to ISC; No Bond Should be Required Since there is no Hardship to PDG**

In balancing the relative hardships, a court must consider the effect of the requested injunction on each party. *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987). Here the balance tips entirely in favor of issuance of the temporary restraining order. PDG will suffer no cognizable harm from the mail being handled as it has for the past seven years. (Call Aff. ¶¶ 4, 8).

Because PDG will suffer no harm no bond should be required by ISC. The Court has the power to dispense with the security requirement when the grant of a TRO or injunction carries no risk of monetary loss to the nonmoving party. *See, e.g., Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d* § 2954 (1995); *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987); *Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2nd Cir. 1974); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972); *United States v. Oregon*, 675 F. Supp. 1249, 1253 (D. Or. 1987). Since PDG suffers no risk of loss or damage in the parties resuming their course of performance for the past seven years no security bond should be required.

**4. There Will Not Be Any Injury to the Public if Relief Is Granted, Only if Relief Is Not Granted**

No injury to the public would result if this Court entered the requested temporary restraining order. To the contrary, the public will be harmed if ISC is compelled to close its office and patients already have been harmed. Further, in the case at hand, there is not truly any

public interest at issue other than the public interest in requiring parties to honor their contractual obligations. *Cf. American Motorcyclist Ass'n v. Wyatt*, 714 F.2d 962, 965 (9th Cir. 1983).

**B. ISC Meets the Requirements of the Alternative Test**

In the Ninth Circuit Court,

a party moving for a preliminary injunction may satisfy its burden by showing either (1) a combination of probably success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.

*Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). As discussed above, there is a strong likelihood of success on the merits and an equally strong probability that denial of a temporary restraining order would cause irreparable injury to ISC, its employees and PDG's patients.

**IV. CONCLUSION**

The Court should issue a TRO requiring PDG to immediately take all steps necessary for the United States Postal Service to resume regular mail service to the Pocatello Office.

DATED: February 5, 2004.

STOEL RIVES LLP



G. Rey Reinhardt

Attorneys for Defendant/Third-Party Plaintiff  
InterDent Service Corporation

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5 day of February, 2004, I caused to be served a true copy of the foregoing **DEFENDANT/THIRD-PARTY PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER** upon the following:

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DATED: this 5 day of February, 2004.



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